

No. 3667.

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**In the United States Circuit Court of Appeals, Ninth Circuit.**

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THE UNITED STATES OF AMERICA, PLAINTIFF IN  
ERROR,

v.

COLUMBIA & NEHALEM RIVER RAILROAD COMPANY,  
DEFENDANT IN ERROR.

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*ERROR TO THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF OREGON.*

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**BRIEF FOR PLAINTIFF IN ERROR.**

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## CONTENTS.

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	Page.
Statement of facts .....	1
Assignments of error .....	6
Questions involved .....	7

### CASES CITED.

<i>Pacific Coast Ry. v. U. S.</i> , 173 Fed. 448 .....	7
<i>Ill. Cent. R. R. v. Louisiana R. R. Com.</i> , 236 U. S. 157 ..	8
<i>Western Oil Refining Co. v. Lipscomb</i> , 244 U. S. 346 ..	9



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## BRIEF FOR PLAINTIFF IN ERROR.

### STATEMENT OF FACTS.

In this case the Government seeks to recover from the defendant penalties for five alleged violations of that provision of section 2 of the Federal Hours of Service Act (34 Stat., p. 1415) relating to telegraph operators, which reads as follows:

*Provided*, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen

hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period of not exceeding three days in any week.

All the causes of action involve the same telegraph operator at the same station, the only difference being the number of hours he was required to work on the five days in question, which varied each day from 15 hours and 20 minutes to 18 hours and 30 minutes.

The determination of this case involves but one question, and as there is no difference between the several causes of action, so far as the law and undisputed facts are concerned, we will consider the facts in the first cause of action as typical of all.

Briefly, the first cause of action alleges:

(a) That during all the times mentioned therein, the defendant was a common carrier engaged in interstate commerce by railroad in the State of Oregon.

(b) That on September 1, 1919, at Kerry, Oregon, the defendant required and permitted its certain telegraph operator and employee, J. G. Nash, to be and remain on duty for a longer period than nine hours in a twenty-four-hour period, that is, from 6.00 a. m. until 11.50 p. m. that night, a total of 17 hours and 50 minutes.

(c) That the Kerry office was one continuously operated night and day; and

(d) That Operator Nash, while on duty at Kerry, used the telegraph or telephone in dispatching, reporting, transmitting, receiving, and delivering orders pertaining to and affecting the movements of trains engaged in interstate commerce.

The carrier filed a general denial (Rec. 14) and did not attempt to justify the service of Operator Nash by reason of any emergency.

The only real question raised at the trial, and the one the trial court based its decision on, was that relating to the interstate character of the railroad and to the work performed by Nash. In other words, the carrier contended that it was not engaged in interstate commerce, and that the trains, the movements of which were directed by Nash, contained no interstate traffic.

There was some question raised at the trial as to the exact hours worked by Nash, but Nash's positive testimony must be accepted as true as ~~of almost~~ <sup>against</sup> any indirect insinuating evidence to the contrary.

Upon the one question involved, the facts are as follows:

The defendant's line of railroad is wholly within the State of Oregon, but connects with the Spokane, Portland & Seattle Railroad at Kerry, Oreg., which is an interchange point between the two railroads. The latter maintains no agent at Kerry. The greater part of the traffic handled by the defendant is logs, it carrying about "60 per cent of the commercial

logs on the Columbia River." It was incorporated as a common carrier.

The defendant handled United States mail, freight, and express destined and consigned to points outside the State of Oregon, or which had originated without that State. But, as will be seen, by a device known as rebilling, the defendant endeavored to change the character of a shipment of freight or express while in course of transportation.

In the ordinary course of business, a shipper, when a loaded car was sent to the assembling point, also sent along with it, in case the shipment was destined to some point off the defendant's line, one bill of lading for the defendant, covering carriage from the point of origin to Kerry, the terminus of defendant's line, and a separate bill of lading covering the movement from Kerry to destination over the Spokane, Portland & Seattle Railroad and other railroads. Such shipments would be received by defendant "regardless of whether final destination is in the State of Oregon." Both bills would always be made out by the shipper and were brought by the train crew to defendant's office at Kerry, where the agent of defendant would file the defendant's bill, *note the final destination of shipment as shown by the accompanying S. P. & S. bill*, deposit the latter in a small box, provided for that purpose, near the S. P. & S. station. The car containing the shipment would then be left on a spur of the S. P. & S. at Kerry. The conductor of the next east bound freight train of the S. P. & S. would stop and get the S. P. & S.



bill from the box, pick up the corresponding car from the spur, and take the car to Clatskanie, the next station east of Kerry on the S. P. & S., where the latter's agent would prepare waybills from Kerry to destination. Cars coming in on the line of the defendant, loaded with freight from the S. P. & S., were handled the same as in the case of an ordinary shipper. (Rec. 56, 57.)

The shipper deals directly with the S. P. & S. concerning transportation of shipments from Kerry to final destination. Logs constitute 95 per cent of the freight taken over defendant's line. Practically all of the freight delivered to the defendant by the S. P. & S. at Kerry, for shipment over defendant's line, originates at points in Oregon. Between 40 and 50 per cent of carload shipments, other than logs, originating at points on defendant's line, are destined for points outside the State of Oregon. It was estimated that the amount of business that the S. P. & S. receives at Kerry for transportation outside the State of Oregon would not exceed 1 per cent of defendant's total business. Movements of general freight ordinarily take place two or three times a week so as not to interfere with the logging traffic. (Rec. 58.)

Defendant carried express to and from points along its line. Upon express packages arriving at Kerry addressed to consignee, located on defendant's line, a separate express bill would be made out and separate payment would be made to the defendant for carriage from Kerry to destination. The method of

handling and accounting for express was similar to that of handling and accounting for freight. No shipments were made either to or from points on defendant's line on through express bills. All express arriving from outside points were addressed to the consignee at Kerry and then were rebilled over the line of defendant. (Rec. 59.)

The destination of all foreign cars was determined by reference to the S. P. & S. bill of lading and placed on the defendant's train sheets. (Rec. 79.)

The work of operator Nash was connected with the movements of trains, at least one of which, on September 1, contained a shipment of shingles in N. W. car 21543, destined to Detroit, Michigan. (Rec. 63.) Similar interstate movement was shown as to the remaining causes of action.

United States mail was handled by defendant free of charge, although no record was kept of it. All mail destined for points on defendant's line was addressed to Kerry and there separated by the postmaster, placed in sacks, addressed to different camps along the defendant's line, and turned over to the defendant for delivery. (Rec. 58.)

#### ASSIGNMENTS OF ERROR.

It is not deemed necessary here to refer in detail to the several assignments of error. They all have reference to the one question involved, to wit, the interstate character of the defendant and its telegraph operator, which the trial court found against the Government.

## QUESTIONS INVOLVED.

Is the character of a shipment to be determined by its ultimate destination when it starts on its journey, regardless of whether the same is moved on a through bill of lading or waybill or rebilled en route?

Was the defendant engaged in interstate commerce on the dates mentioned in the Government's complaint?

These questions have been decided favorably to the Government's contention by this court in the case of *Pacific Coast Ry. v. U. S.*, 173 Fed. 448. The facts in that case were substantially as follows: The Pacific Coast Railway was a narrow-gauge railroad situated wholly within the State of California and received freight from the Southern Pacific Company at San Luis Obispo which had been consigned from points in Eastern States and which had in some instances been billed from point of shipment to a station on the line of the plaintiff in error, and in other instances was billed to San Jose, a terminal point of the Southern Pacific Company. The road of plaintiff in error being narrow gauge, no cars of the Southern Pacific Company ever passed over its line, and all goods consigned to points on its line were unloaded at San Luis Obispo and there reloaded upon the cars of the plaintiff in error. In its opinion this court said:

The plaintiff in error argues that the decision of the court below rests upon the false premise that to render services to one who is engaged in interstate commerce is to engage in that commerce. But to our view, it rests upon a

broader basis than this. It rests upon the fact that the movement of the consigned goods to their ultimate destination from the point at which they were shipped in another State was in part conducted upon the road of the plaintiff in error, and that the interstate character of the shipment did not end until the transportation had reached its ultimate completion. The road of the plaintiff in error became a connecting carrier by virtue of the agreement between the consignor and the first carrier, whereby the latter undertook to deliver the goods at San Jose en route to their ultimate destination. Neither the fact that the consignor of goods originally consigned to San Jose directed the Southern Pacific Company prior to their arrival there to change the destination to a point on the road of the plaintiff in error, nor the fact that the road of the latter was so constructed as to make necessary the unloading and transfer of the goods to its cars, is sufficient to affect the interstate character of the transportation.

In the case of *Illinois Central Railroad Company v. Louisiana Railroad Commission*, 236 U. S. 157, the Supreme Court of the United States said, at page 163:

When freight actually starts in the course of transportation from one State to another it becomes a part of interstate commerce. The essential nature of the movement and not the form of the bill of lading determines the character of the commerce involved. And generally when this interstate character has been acquired it continues at least until the

load reaches the point where the parties originally intended that the movement should finally end. And cases cited.

The Supreme Court of the United States, in a later case, reannounced the same principle, and which this court had theretofore announced in the Pacific Coast case, *supra*. The case referred to is that of *Western Oil Refining Company v. Lipscomb*, 244 U. S. 346, wherein the court said at page 349:

Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one State to another a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. As this court often has said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive. And cases cited.

The undisputed facts in the instant case show that the defendant carrier was engaged in interstate commerce on the days in question, and that Operator Nash was so engaged. And this character of commerce is determined by the test prescribed by this court and the Supreme Court of the United States.

Without referring to the assignments of error in detail, it is manifestly evident that the trial court erred in not entering judgment for the Government;



in making findings to the effect that the carrier and the employee were not engaged in interstate commerce; and in refusing so to find, as requested by the Government.

It is, therefore, respectfully submitted that the judgment of the trial court should be reversed and the case remanded for a new trial.

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